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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
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10 ROBERTO ANTONIO BALLARD,
11 Petitioner,
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13 vs.
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15 L. SMALL, Warden, et al.,
16 Respondents.
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CASE NO. 09-CV-957 - IEG (CAB)

ORDER:

- (1) ADOPTING IN FULL REPORT AND RECOMMENDATION;
- (2) DENYING AND DISMISSING PETITION FOR WRIT OF HABEAS CORPUS;
- (3) DENYING REQUEST FOR EVIDENTIARY HEARING; and
- (4) GRANTING IN PART CERTIFICATE OF APPEALABILITY.

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20 On May 4, 2009, Petitioner Roberto Antonio Ballard (“Petitioner”), a state prisoner proceeding
21 pro se, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (“Petition”) claiming
22 violations of his federal constitutional rights. Petitioner is challenging his conviction in the Superior
23 Court for the County of San Diego, case number SCE247764, for involuntary manslaughter and
24 assault on a child with force likely to produce great bodily injury resulting in death. (Lodgment No.1,
25 vol. 2 at 0284-85.)

26 Petitioner alleges the following constitutional violations in his Petition: 1) the trial court failed
27 to properly instruct the jury on all elements of the crime; 2) he was denied his right to a speedy trial;
28 3) he was shackled in the presence of the jury without a prior finding by the trial court of manifest

1 necessity; and 4) the trial court refused to acknowledge exculpatory evidence exonerating him.
 2 Petitioner also seeks an evidentiary hearing regarding the issue of exculpatory evidence. This matter
 3 was referred to Magistrate Judge Bencivengo, pursuant to 28 U.S.C. § 636(b)(1)(B). Respondent filed
 4 an answer on September 10, 2009, asserting all claims are procedurally barred, and, notwithstanding,
 5 fail on the merits. [Doc. No. 11]. Petitioner filed his Traverse on November 13, 2009.

6 On January 5, 2010, the Magistrate Judge issued a Report and Recommendation (“R&R”)
 7 recommending the Court deny both the Petition and request for evidentiary hearing. [Doc. No. 18].
 8 Petitioner filed objections to the R&R on February 1, 2010. [Doc. No. 19]. Having undertaken a *de*
 9 *novo* review of the record and having considered Petitioner’s claims, the R&R, and Petitioner’s
 10 objections, the Court hereby: (1) ADOPTS IN FULL the R&R; (2) DENIES and DISMISSES the
 11 petition; (3) DENIES the request for an evidentiary hearing; and (4) GRANTS a certificate of
 12 appealability as to claim three.

13 BACKGROUND

14 I. Factual Background

15 The Court adopts the factual background as stated by the Magistrate Judge, (see R&R, at 2-3),
 16 which in turn takes the facts from the Court of Appeal’s opinion in People v. Ballard, No. D049103,
 17 2007 WL 1600386 (Cal. Ct. App. June 5, 2007). Pursuant to 28 U.S.C. § 2254(e)(1), the Court, as did
 18 the Magistrate Judge, presumes the factual determinations to be correct.

19 II. Procedural Background

20 The San Diego County District Attorney’s office charged Petitioner on February 16, 2005,
 21 with one count of assault on a child by means of force likely to produce great bodily injury resulting
 22 in death, a violation of California Penal Code (“Penal Code”) § 273ab, and one count of murder, a
 23 violation of Penal Code § 187(a). (Lodgment No. 1, vol. 1 at 0001-02.) The Information also alleged
 24 Petitioner served a separate prison term for a prior conviction within the meaning of Penal Code §§
 25 667.5(b) and 668 (Prison Prior). (Id.)

26 On April 21, 2006, after a bifurcated trial, a jury found Petitioner guilty of assault on a child
 27 with force likely to produce great bodily injury resulting in death under Penal Code § 273ab, and
 28 involuntary manslaughter, a lesser included offense of murder, under Penal Code § 187(a). (Lodgment

1 No. 2, vol. 10 at 1426-27.) At a subsequent hearing, Petitioner admitted he had served a prior prison
 2 term within the meaning of Penal Code §§ 667.5 and 668. (Lodgment No. 2, vol. 11 at 1501-05.) On
 3 July 18, 2006, Petitioner appeared at the sentencing hearing and was sentenced to 26 years to life. (*Id.*
 4 at 1513-51.) On December 11, 2006, Petitioner appealed to the California Court of Appeal, which
 5 affirmed the conviction and sentence in a June 5, 2007, unpublished opinion. (Lodgments No. 3, 4,
 6 5, 6.) On June 22, 2007, Petitioner filed a Petition for Review in the California Supreme Court, which
 7 that court denied without comment or citation on August 8, 2007. (Lodgments No. 7, 8.)

8 Petitioner then filed a petition for writ of habeas corpus in the San Diego Superior Court on
 9 November 29, 2007, which was denied in an unpublished opinion on December 6, 2007. (Lodgments
 10 No. 9, 10.) Petitioner thereafter filed a petition writ of habeas corpus in the California Court of
 11 Appeal on February 8, 2008. (Lodgment No. 11.) This petition was also denied in an unpublished
 12 opinion on May 9, 2008. (Lodgment No. 12.) Ultimately, on June 2, 2008, Petitioner filed a petition
 13 for writ of habeas corpus in the California Supreme Court. (Lodgment No. 13.) On December 10,
 14 2008, the California Supreme Court denied the petition with citation to *In re Dixon*, 41 Cal. 2d 756
 15 (1953). No opinion or other explanation followed the citation. (Lodgment No. 14.)

16 The instant Petition was timely filed. Respondent filed an answer and Petitioner submitted a
 17 Traverse. [Doc. Nos. 11, 17] The Magistrate Judge issued the R&R, recommending the Court deny
 18 and dismiss the Petition on the merits, and deny the request for an evidentiary hearing. [Doc. No. 18].
 19 Petitioner subsequently filed his objections to the R&R. [Doc. No. 19]. Petitioner only raises specific
 20 objections as to the shackling claim (claim three), but otherwise only makes a general objection to the
 21 R&R's rejection of his other claims. [See Id.]

22 STANDARD OF REVIEW

23 A federal court may grant a habeas corpus petition pursuant to 28 U.S.C. § 2254 only if the
 24 state court's decision was either "contrary to, or involved an unreasonable application of, clearly
 25 established Federal law, as determined by the Supreme Court of the United States," or "based on an
 26 unreasonable determination of the facts in light of the evidence presented in the state court
 27 proceeding." 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 403, 412-13 (2000). To grant a habeas
 28 petition upon a State court decision that was "contrary to" clearly established federal law, the state

1 court must either have made a finding on a question of law which was “opposite to that reached” by
 2 the Supreme Court, or judged a case differently than the Supreme Court has “on a set of materially
 3 indistinguishable facts.” Id. at 413. In order to grant a habeas petition upon a finding that the state
 4 court’s adjudication of a claim involved “an unreasonable application” of clearly established federal
 5 law, the state court must have correctly identified the “governing legal principle” from Supreme Court
 6 precedent, but unreasonably applied that principle to the facts of the prisoner’s case. Id.

7 When making the “unreasonable application” inquiry, a federal habeas court asks “whether the
 8 state court’s application of clearly established federal law was objectively unreasonable.” Id. at 409.
 9 The state court’s decision must be more than “incorrect or erroneous.” Lockyer v. Andrade, 538 U.S.
 10 63, 75-76 (2003). To warrant habeas relief, the state court decision must be in violation of a Supreme
 11 Court decision either directly addressing the issue before the state court or clearly establishing a
 12 “controlling legal standard” applicable to the petitioner’s claims. See Wright v. Van Patten, 552 U.S.
 13 120, 125 (2008); Panetti v. Quarterman, 551 U.S. 930, 953 (2007).

14 Habeas relief may also be granted where the state court’s decision was “based on an
 15 unreasonable determination of the facts in light of the evidence presented in the State court
 16 proceeding.” 28 U.S.C. § 2254(d)(2). “Factual determinations by state courts are presumed correct
 17 absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the
 18 merits in a state court and based on a factual determination will not be overturned on factual grounds
 19 unless objectively unreasonable in light of the evidence presented in the state-court proceeding, §
 20 2254(d)(2).” Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

21 ANALYSIS

22 Since Petitioner objects to the recommendations of the Magistrate Judge on all four claims,
 23 this Court must review *de novo* those portions of the R&R. 28 U.S.C. § 636(b)(1)(C); Holder v.
 24 Holder, 392 F.3d 1009, 1022 (9th Cir. 2004). Under 28 U.S.C. § 636 (b)(1)(C), the Court may “accept,
 25 reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.”
 26 Where the state’s highest court has not provided a reasoned decision for the claims at issue, the Court
 27 “looks through” to the “last reasoned” state court decision. Ylst v. Nunnemaker, 501 U.S. 797, 804-06
 28 (1991). The last reasoned state opinion is the “last *explained* state-court judgment” on the Petitioner’s

1 claim which is “informative with respect to the question before us.” Id. at 805. When the dispositive
 2 state court’s judgment “does not supply reasoning for its decision,” federal habeas courts must conduct
 3 “an independent review of the record” to decide whether the state court’s adjudication of the issue was
 4 contrary to, or involved an unreasonable application of, clearly established federal law. Delgado v.
 5 Lewis, 223 F.3d 976, 982 (9th Cir. 2000), overruled on other grounds by Andrade, 538 U.S. at 75-76.

6 In this case, Petitioner alleges four constitutional violations: 1) the trial court failed to properly
 7 instruct the jury on all elements of the crime in declining to provide a definition for “conscious
 8 disregard” for human life as requested by the jury during jury deliberations; 2) he was denied his right
 9 to a speedy trial due to the trial court’s delay of the proceedings; 3) he was shackled in the presence
 10 of the jury without a prior finding by the trial court of manifest necessity and thus denied his right to
 11 a fair trial; and 4) the trial court refused to acknowledge evidence withheld by prosecution establishing
 12 his innocence, for which Petitioner is requesting an evidentiary hearing.

13 **I. Procedural Default**

14 Respondent asserts Petitioner’s claims one, two, and four are procedurally barred because the
 15 state habeas courts, citing to In re Dixon, 41 Cal. 2d 756 (1953), determined Petitioner failed to
 16 present these claims on direct appeal. Respondent asserts claim three is also procedurally defaulted
 17 because the state appellate court, citing People v. Ward, 36 Cal. 4th 186, 206 (2005), decided
 18 Petitioner’s trial counsel did not object to the ankle restraint at trial. The decisions of the Supreme
 19 Court “suggest that the procedural-bar issue should ordinarily be considered first.” Lambrix v.
 20 Singletary, 520 U.S. 518, 524 (1997). Accordingly, the Court addresses this issue at the outset.

21 Federal courts “will not review a question of federal law decided by a state court if the decision
 22 of that court rests on a state law ground that is independent of the federal question and adequate to
 23 support the judgment.” Coleman v. Thompson, 501 U.S. 722, 729 (1991) (citation omitted). This is
 24 true “whether the state law ground is substantive or procedural.”¹ Id. (citation omitted). Federal courts
 25 cannot review “such independently supported judgments on direct appeal: since the state-law

27 ¹The doctrine bars federal habeas when a state court declines to “address a prisoner’s federal
 28 claims because the prisoner had failed to meet a state procedural requirement. In these cases, the state
 judgment rests on independent and adequate state procedural grounds.” Coleman, 501 U.S. at 729
 (citation omitted).

1 determination is sufficient to sustain" the judgment. Lambrix, 520 U.S. at 522. If there is an "adequate
 2 and independent finding of procedural default," the petitioner will be precluded from obtaining federal
 3 habeas review of a federal claim unless he can demonstrate: 1) "cause" exists for the default and actual
 4 "prejudice" resulted from the claimed violation, or 2) a "fundamental miscarriage of justice" will
 5 result from failure to consider the claim. Harris v. Reed, 489 U.S. 255, 262 (1989) (citation omitted).

6 In this case, Petitioner's claims one, two, and four (based on instructional error, speedy trial,
 7 and evidence of actual innocence) were presented in a state habeas corpus petition and denied by the
 8 California courts because of Petitioner's failure to present them on direct appeal. (See Lodgments No.
 9 13, 14.) As to claim three (denial of a fair trial due to shackling him in the presence of the jury),
 10 Petitioner presented it to the California Court of Appeal, which denied it on the ground that
 11 Petitioner's trial counsel failed to object to the ankle restraint at trial. See Ballard, 2007 WL 1600386,
 12 at *2.

13 In reviewing the California Supreme Court's denial of Petitioner's claims one, two, and four,
 14 under Dixon, the Magistrate Judge properly exercised her discretion and proceeded to the merits of
 15 these claims since adjudicating the issue of procedural default would have been "more complicated
 16 and time consuming." See Boyd v. Thompson, 147 F.3d 1124, 1127 (9th Cir. 1998) (quoting Batchelor
 17 v. Cupp, 693 F.2d 859, 864 (9th Cir. 1982)). As to claim three, the Magistrate Judge correctly
 18 concluded federal review is not barred because Respondent failed to assert that the procedural bar
 19 applied by the appellate court denying this claim was an "independent and adequate" state ground and
 20 therefore failed to meet the initial burden under Bennet v. Mueller, 322 F.3d 573, 586 (9th Cir. 2003).
 21 Accordingly, this Court will also proceed to the merits of Petitioner's claims. Because the state courts
 22 denied all of Petitioner's claims on procedural grounds, and did not reach the merits of the claims, this
 23 Court conducts a *de novo* review. See Pirtle v. Morgan, 313 F.3d 1160, 1167-68 (9th Cir. 2002).

24 **II. Petitioner's Claims**

25 **A. Instructional Error (Claim One)**

26 Petitioner asserts the trial court failed to properly instruct the jury on all elements of the crime
 27 of assault on a child with force likely to produce great bodily injury resulting in death, which resulted
 28 in a denial of due process and his right to a fair trial. Petitioner alleges instructional error occurred

1 when the trial court declined to provide a definition for “conscious disregard”² as requested by the jury
 2 during jury deliberations and instead directed the jury to “use the everyday meaning” of the phrase.
 3 (Mem. of P. & A. Supp. Pet. at 11-12; Lodgment No.1, vol 2 at 194-95.) The Magistrate Judge
 4 correctly identified the relevant inquiry as “whether the ailing instruction by itself so infected the
 5 entire trial that the resulting conviction violates due process.” See Cupp v. Naughten, 414 U.S. 141,
 6 147 (1973). To warrant habeas relief, “it must be established not merely that the instruction is
 7 undesirable, erroneous, or even ‘universally condemned,’ but that it violated some right which was
 8 guaranteed to the defendant by the Fourteenth Amendment.” Id. at 146.

9 In making the determination, the instruction ““may not be judged in artificial isolation,”” but
 10 must be “considered in the context of the instructions as a whole and the trial record.” Estelle v.
 11 McGuire, 502 U.S. 62, 72 (1991) (quoting Cupp, 414 U.S. at 147). A “judgment of conviction is
 12 commonly the culmination of a trial which includes testimony of witnesses, argument of counsel,
 13 receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged
 14 instruction but one of many such instructions, but the process of instruction itself is but one of several
 15 components of the trial which may result in the judgment of conviction.” Cupp, 414 U.S. at 147.

16 Here, Petitioner was charged with one count of assault on a child by means of force likely to
 17 produce great bodily injury resulting in death and one count of second degree murder. (Lodgment No.
 18 1, vol. 1 at 0001-02.) The court instructed the jury on these crimes, as well as on the crime of
 19 involuntary manslaughter (a lesser included offense of second degree murder) with the Judicial
 20 Council of California Criminal Jury Instructions (“CALCRIM”).³ (Lodgment No. 1, vol. 2 at 178-79,
 21 181-82, 187-88). A finding of “conscious disregard” was required for Petitioner to be found guilty
 22 of second degree murder, but was not required for Petitioner to be found guilty of involuntary
 23 manslaughter or assault on a child resulting in death. The crux of Petitioner’s first claim is that the
 24 states of mind for the crimes of second degree murder (of which he was acquitted) and assault on a
 25 child causing death (of which he was convicted) are equivalent.

26
 27 ²Although Petitioner asserts the jury requested the meaning of “conscious disregard for human
 28 life,” (see Mem. of P. & A. Supp. Pet. at 10-11), in actuality the jury note stated, “what is the meaning
 of conscious disregard?” (See Lodgment No.2, vol. 2 at 194).

³ CALCRIM was adopted in 2005 as the official jury instructions in California.

1 Petitioner's theory, however, is supported by nothing more than speculation. The Magistrate
 2 Judge noted the jury instructions accurately defined the crimes for which Petitioner was charged and
 3 their elements under California law, and contained no errors. Moreover, the Magistrate Judge correctly
 4 concluded that even if instructional error had occurred, when viewed in light of the entire trial record,
 5 "the ailing instruction by itself" did not so infect "the entire trial that the resulting conviction violates
 6 due process."⁴ See Cupp, 414 U.S. at 147.

7 Having reviewed the trial record, and noting no specific objection from Petitioner as to this
 8 claim, the Court agrees with the Magistrate Judge's recommendation. Accordingly, the Court finds
 9 Petitioner is not entitled to habeas relief on his first claim.

10 B. Violation of Right to a Speedy Trial (Claim Two)

11 Petitioner next argues the trial court delayed proceedings without "a valid waiver" and violated
 12 Petitioner's "right to a speedy trial to his prejudice." (Pet. at 7; Mem. of P. & A. Supp. Pet. at 15.) To
 13 determine whether Petitioner has been deprived of his right to a speedy trial, the Court considers the
 14 following four factors: "[l]ength of delay, the reason for the delay, the defendant's assertion of his
 15 right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530 (1972). The Magistrate
 16 Judge concluded the time between Petitioner's first court appearance on February 16, 2005, and the
 17 trial date of April 6, 2006, was "presumptively prejudicial" and thus triggered examination of the
 18 remaining Barker factors. See Doggett v. United States, 505 U.S. 647, 651-52 (1992).

19 Having considered the remaining Barker factors, the Court agrees with the Magistrate Judge
 20 and finds Petitioner's speedy trial rights were not violated by any delay. As the Magistrate Judge
 21 pointed out, the majority of the delays were attributed to requests for continuances by Petitioner's
 22 attorneys. Moreover, the record indicates Petitioner agreed to the great majority of the continuances.

23 ⁴Evidence at trial included: 1) the exhibits - which contained Petitioner's statements to law
 24 enforcement stating he saw the victim fall from the table, (Lodgment No.1, vol. 1 at 42), and photos
 25 of the victim's injuries showing bruises that resembled finger marks to the side of the head and right
 26 calf, and bruising to the back, shoulder, thigh, and right arm, (Lodgment No.2, vol. 1 at 20-25;
 27 Lodgment No.2, vol. 8 at 1213-15); 2) testimony by the victim's mother stating she did not notice any
 28 bruises when she bathed the child that morning before leaving the child in Petitioner's care,
 (Lodgment No. 2, vol. 1 at 92-94); 3) medical testimony stating the injuries suffered were not
 consistent with an accident, but rather "consistent with blunt force trauma to multiple parts of the
 body," (Lodgment No. 2, vol. 4 at 611-12); and 4) law enforcement's testimony regarding Petitioner's
 inconsistent statements of how the victim sustained the injuries that led to his death, (Lodgment No.
 2, vol. 6 at 879-1010).

1 Petitioner's failure to assert the right to a speedy trial, therefore, "makes it difficult for Petitioner to
 2 prove that he was denied a speedy trial." See Barker, 407 U.S. at 532. As the Supreme Court has
 3 indicated, "barring extraordinary circumstances," the Court would be hesitant to find "that a defendant
 4 was denied this constitutional right on a record that strongly indicates, as does this one, that the
 5 defendant did not want a speedy trial." Id. at 536.

6 Lastly, Petitioner failed to demonstrate any prejudice from the delay. Prejudice to a defendant
 7 is "assessed in the light of the interests of defendants which the speedy trial right was designed to
 8 protect." Id. at 532. The Supreme Court has identified three such interests: "(i) to prevent oppressive
 9 pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the
 10 possibility that the defense will be impaired." Id. Petitioner has not alleged any facts, and the record
 11 is devoid of any, indicating he was prejudiced by the delay.

12 Accordingly, having reviewed the record, and noting Petitioner raises no specific objection as
 13 to this claim, the Court agrees with the Magistrate Judge's recommendation that federal habeas relief
 14 is not warranted as to claim two.⁵

15 C. Shackling: Abuse of Discretion (Claim Three)

16 Petitioner's third claim alleges a violation of due process and denial of a fair trial because he
 17 remained shackled in the presence of the jury. It is well established that "the sight of shackles and gags
 18 might have a significant effect on the jury's feelings about the defendant." Illinois v. Allen, 397 U.S.
 19 337, 344 (1970); accord Rhoden v. Rowland, 172 F.3d 633, 636 (9th Cir. 1999) (noting that shackles
 20 create "an inherent danger that the jury may form the impression that the defendant is dangerous or
 21 untrustworthy"). Accordingly, "the Fifth and Fourteenth Amendments prohibit the use of physical
 22 restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they
 23 are justified by a state interest specific to a particular trial." Deck v. Missouri, 544 U.S. 622, 629
 24 (2005); accord Williams v. Woodford, 384 F.3d 567, 591 (9th Cir. 2004) ("A criminal defendant has
 25

26
 27 ⁵ In regards to Petitioner's Equal Protection challenge, Petitioner failed to provide any facts
 28 to support the claim. The Magistrate Judge properly concluded Petitioner wholly failed to establish
 he was treated differently from similarly situated individuals, and is therefore not entitled to relief
 because "conclusory allegations which are not supported by a statement of specific facts do not
 warrant habeas relief." See James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994).

1 a constitutional right to be free of shackles and handcuffs in the presence of the jury absent an
 2 essential state interest that justifies the physical restraints.” (citations omitted)).

3 However, shackling by itself does not entitle Petitioner to habeas relief. Rather, Petitioner must
 4 also demonstrate the shackling was “seen by the jury” and there was no “adequate justification” given
 5 for the shackling. See Deck, 544 U.S. at 635; accord Larson v. Palmateer, 515 F.3d 1057, 1062 (9th
 6 Cir. 2008) (“Visible restraints are therefore not permitted unless the trial court finds that they are
 7 necessary while ‘taking account of the circumstances of the particular case.’” (citing Deck, 544 U.S.
 8 at 632)). In this case, there is no evidence in the record to demonstrate the physical restraints were
 9 visible to the jury. The record reflects that Petitioner’s hands were not restrained, and that Petitioner’s
 10 ankle restraint was under a table which was covered by a table skirt all the way around. (Lodgment
 11 No. 2, vol. 5 at 830-31.) The record also indicates Petitioner was dressed in civilian clothes, he did
 12 not testify before the jury, and that during voir dire and the trial he was seated whenever the jury
 13 entered and exited the courtroom. (Id., vol. 1 at 1, 5, 61; id., vol. 2 at 250, 260, 262, 277, 279, 280;
 14 id., vol. 5 at 698, 827; id. vol. 7 at 1017, 1025). Finally, the record demonstrates Petitioner’s trial
 15 counsel declined, and the trial court decided not to give, a jury instruction regarding shackling because
 16 they both agreed the shackling was not “obvious” or “visible to anybody.” (Id., vol. 5 at 830-31.)
 17 Accordingly, because there is no evidence in the record that the shackles were visible to the jury,
 18 Petitioner cannot prevail on this claim.⁶ See Deck, 544 U.S. at 635; Larson, 515 F.3d at 1062.

19 Moreover, even if Petitioner can demonstrate a constitutional error as a result of the shackling,
 20 the Court must nonetheless assess whether this error “had substantial and injurious effect or influence
 21 in determining the jury’s verdict.” Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (citation
 22 omitted); see also Fry v. Piller, 551 U.S. 112, 119-20 (2007) (holding that Brecht harmless error

23 ⁶ To the extent Petitioner argues the trial court’s decision was based on an unreasonable
 24 determination of the facts in light of evidence presented in the state proceeding, Petitioner failed to
 25 meet his burden. As previously stated, clear and convincing evidence contradicting the state court’s
 26 factual determination is required to render a state court’s decision objectively unreasonable. See
 27 Miller-El, 537 U.S. at 340. Here, Petitioner’s only contrary evidence is his declaration that he
 28 remembers a juror leaning over to another juror, talking back and forth while looking down in the
 direction of Petitioner’s shackles, and pointing a finger at his shackles. (POF&R at 7.) This, however,
 is insufficient by itself to contradict by clear and convincing evidence the state court’s determination
 that the shackles were not visible to the jury. In any event, even if true, “[t]he jury’s ‘brief or
 inadvertent glimpse’ of a shackled defendant is not inherently or presumptively prejudicial,” and
 therefore does not amount to a constitutional error. Ghent v. Woodford, 279 F.3d 1121, 1133 (9th Cir.
 2002) (citations omitted).

1 review applies whether or not the state court recognized the error and reviewed it for harmlessness);
 2 Larson, 515 F.3d at 1064 (applying Brech harmless error review where the defendant was compelled
 3 to wear a security leg brace). To determine whether the imposition of physical restraints constituted
 4 prejudicial error, the Ninth Circuit has considered “the appearance and visibility of the restraining
 5 device, the nature of the crime with which the defendant was charged and the strength of the state’s
 6 evidence against the defendant.” Larson, 515 F.3d at 1064 (citation omitted). In this case, the jury’s
 7 awareness of the shackles was minimal at best. On the other hand, because Petitioner was charged
 8 with a violent crime, “the risk of prejudice increases, because shackling ‘essentially brands him as
 9 having a violent nature.’” Id. (citation omitted). Concerns about prejudice are mitigated, however,
 10 where the state’s evidence against the defendant is “overwhelming,” see id., as it was in this case.

11 For the foregoing reasons, although Petitioner’s allegedly visible shackling without adequate
 12 justification is troubling, Petitioner failed to demonstrate that it had a “substantial and injurious effect
 13 or influence in determining the jury’s verdict.”⁷ See Brech, 507 U.S. at 623. Accordingly, the Court
 14 agrees with the Magistrate Judge’s recommendation and denies habeas relief as to claim three.

15 D. Actual Innocence / Exculpatory Evidence

16 Petitioner’s fourth and final claim alleges the trial court refused to acknowledge evidence
 17 exonerating him, and the prosecution withheld exculpatory evidence in violation of his federal due
 18 process right as prescribed in Brady v Maryland, 373 U.S. 83 (1963). Petitioner alleges the prosecutor
 19 withheld information that the victim was throwing up blood for two days prior to the underlying
 20 incident in this case, and that the victim’s four year old sister, who was two years old at the time, had
 21 witnessed the murder. Petitioner seeks an evidentiary hearing on this claim. The R&R sets forth the
 22 correct legal standard for reviewing both Petitioner’s claim that a Brady violation occurred and his
 23 request for an evidentiary hearing.

24
 25 ⁷ Petitioner’s reliance on Lewis v. Marshall, 612 F. Supp. 2d 185 (N.D. N.Y. 2009), is
 26 misplaced. In that case, after finding the petitioner was “visibly shackled” without justification, the
 27 district court granted habeas relief without requiring the petitioner to demonstrate “actual prejudice.”
 28 Lewis, 612 F. Supp. 2d at 198-99. The present case is different, however, because Petitioner has failed
 to rebut the state court’s determination that the shackles were *not* visible to the jury. Moreover, even
 if the shackles were visible to the jury, Petitioner has failed to demonstrate that this error “had
 substantial and injurious effect or influence in determining the jury’s verdict.” Brech, 507 U.S. at
 623 (citation omitted). As the Ninth Circuit decision in Larson, 515 F.3d at 1064, demonstrates, it is
 the Brech harmless error review, and not the Champan v. California, 386 U.S. 18 (1967), higher
 standard applied by the district court in Lewis, that properly governs in this case.

1 1. *Exculpatory Evidence*

2 In Brady, the Supreme Court proclaimed that “the suppression by the prosecution of evidence
 3 favorable to an accused upon request violates due process where the evidence is material either to guilt
 4 or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. at 87. The
 5 Supreme Court has “since held that the duty to disclose such evidence is applicable even though there
 6 has been no request by the accused.” Strickler v. Greene, 527 U.S. 263, 280 (1999) (citing United
 7 States v. Agurs, 427 U.S. 97, 107 (1976)). The Supreme Court has explained that “strictly speaking,
 8 there is never a real ‘Brady violation’ unless the nondisclosure was so serious that there is a reasonable
 9 probability that the suppressed evidence would have produced a different verdict.” Id. at 281. There
 10 are three components of a true Brady violation: “The evidence at issue must be favorable to the
 11 accused, either because it is exculpatory, or because it is impeaching; that evidence must have been
 12 suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” Id. at 281-
 13 82. In adjudicating the merits of the Brady claim in this case, the Magistrate Judge correctly
 14 determined Petitioner could not establish a Brady violation occurred.

15 First, the Magistrate Judge correctly concluded Petitioner failed to establish that the evidence
 16 was in fact suppressed by the State. As the R&R explained, it is clear from the record that the victim’s
 17 uncle claimed that the victim was allegedly throwing up blood for two days before the incident for the
 18 first time at trial. (See R&R at 17-18; see also Lodgment No. 2, vol.2 at 385-86.) Accordingly, this
 19 information was not known to the prosecution prior to trial. Similarly, the record also clearly
 20 establishes the prosecutor learned the information about the two-year old sibling witnessing the
 21 murder when the court-appointed advocate testified about it at the sentencing hearing. (See Lodgment
 22 No. 2, vol. 11 at 1538.) Because Petitioner presents no evidence the prosecutor was previously aware
 23 of this allegedly exonerating information, Petitioner is unable to establish the State suppressed it.

24 Second, the Court agrees with the Magistrate Judge that Petitioner cannot establish he was
 25 prejudiced by any alleged suppression. In determining the question of prejudice, the Court analyzes
 26 the allegedly suppressed evidence “in the context of the entire record.” Benn v. Lambert, 283 F.3d
 27 1040, 1053 (9th Cir. 2002) (quoting Agurs, 427 U.S. at 112). “Evidence is deemed prejudicial, or
 28 material, only if it undermines confidence in the outcome of the trial.” Id. As the Magistrate Judge

1 explained, considerable evidence was presented at trial indicating the victim died from injuries
 2 sustained in a violent physical attack while under Petitioner's care.⁸ (R&R at 19.) Accordingly, the
 3 Court agrees with the Magistrate Judge that the allegedly suppressed evidence was not so prejudicial
 4 to Petitioner as to "undermine[] confidence in the outcome of the trial." See Benn, 283 F. 3d at 1053.

5 2. *Evidentiary Hearing*

6 Petitioner's request for an evidentiary hearing is governed by 28 U.S.C. §2254(e)(2). Williams,
 7 529 U.S. at 429. The court must first determine whether a "factual basis exists in the record" to
 8 support the petitioner's claim. See Baja v. Ducharme, 187 F.3d 1075, 1078 (9th Cir. 1999). If it does
 9 not, the court must next determine whether the petitioner has "failed to develop the factual basis" of
 10 that claim in state court proceedings. 28 U.S.C. § 2254(e)(2). If so, § 2254(e)(2) provides that the
 11 court shall not hold an evidentiary hearing on the claim, unless petitioner shows that: (A) the claim
 12 relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the
 13 Supreme Court, that was previously unavailable" or "a factual predicate that could not have been
 14 previously discovered through the exercise of due diligence;" and (B) "the facts underlying the claim
 15 would be sufficient to establish by clear and convincing evidence that but for constitutional error, no
 16 reasonable factfinder would have found the applicant guilty of the underlying offense." On the other
 17 hand, if the court determines that petitioner has not "failed to develop the factual basis" in state court,
 18 the district court may proceed to consider whether a hearing is appropriate or required under
 19 Townsend v. Sain, 372 U.S. 293 (1963). Insyxiengmay v. Morgan, 403 F.3d 657, 669-70 (9th Cir.
 20 2005) (quoting Baja, 17 F.3d at 1078).

21 Here, the Magistrate Judge correctly determined that the trial transcripts and other records in
 22 the case provide a sufficient factual basis to decide this claim. Moreover, even if there is no adequate
 23 factual basis, Petitioner is not entitled to an evidentiary hearing because he "failed to develop" his
 24 claim in state court. See 28 U.S.C. § 2254(e)(2). "[A] failure to develop the factual basis of a claim
 25 is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner

26 ⁸ Evidence at trial included: testimony from the victim's brother that he awoke to the victim's
 27 cries, the sounds of loud hits, and Petitioner's voice, (Lodgment No. 2, vol. 7 at 1067), as well as
 28 medical testimony and testimony from law enforcement which revealed that the victim's injuries were
 "consistent with blunt force trauma to multiple parts of the body" and that Petitioner's explanation of
 how the victim was injured while in his care was inconsistent with the injuries suffered, (Lodgment
 No. 2, vol. 4 at 448-77, 611-12).

1 or the prisoner's counsel." Williams, 529 U.S. at 432. As the Supreme Court has stated, at the very
 2 least, diligence in a usual case would require the petitioner to "seek an evidentiary hearing in state
 3 court in the manner prescribed by state law." Id. at 437. In the present case, the Magistrate Judge
 4 correctly determined that Petitioner was not diligent, and therefore "failed to develop" his claim,
 5 because he never requested an evidentiary hearing on his Brady claim in the habeas corpus petition
 6 he filed in the California Supreme Court. (R&R at 17.)

7 Finally, having failed to develop his claim in state court, Petitioner is not entitled to an
 8 evidentiary hearing unless he is able to meet the statute's "stringent requirements" that apply in such
 9 situations. See Williams, 529 U.S. at 437. In the present case, Petitioner cannot do that because he
 10 cannot demonstrate that "the facts underlying the claim would be sufficient to establish by clear and
 11 convincing evidence that but for constitutional error, no reasonable factfinder would have found the
 12 applicant guilty of the underlying offense." See 28 U.S.C. § 2254(e)(2)(B). As the Magistrate Judge
 13 noted, evidence that the victim was throwing up blood in the days before his death "may have
 14 indicated that he was suffering from some medical condition or injury before he died." (R&R at 19.)
 15 Similarly, with respect to the two-year old girl that allegedly witnessed the murder, the Magistrate
 16 Judge noted that "there is no evidence that she would have named anyone other than [Petitioner] as
 17 the person who killed [the victim]." (Id.) Accordingly, the Court agrees with the Magistrate Judge that
 18 Petitioner is not entitled to an evidentiary hearing on this claim.

19 3. *Actual Innocence*

20 Petitioner's final claim alleges that denial of his "due process rights has caused a fundamental
 21 miscarriage of justice as he is actually innocent." (Pet. at 9; Mem. of P. & A. Supp. Pet. at 21).
 22 Petitioner cites Schlup v. Delo, 513 U.S. 298 (1995), and Jaramillo v. Steward, 340 F. 3d 877 (9th Cir.
 23 2003), as support for his claim. However, Schlup and Jaramillo provide an exception which allows
 24 for consideration of the merits of a claim that is procedurally barred. Here, because the Court has
 25 addressed the merits of Petitioner's claims, it is unnecessary to address the procedural bar exception.⁹

26
 27 ⁹ In any event, to be entitled to proceed through the "actual innocence" gateway, Petitioner
 28 must demonstrate that "a constitutional violation has 'probably resulted in the conviction of one who
 is actually innocent.'" Jaramillo, 340 F.3d at 881 (quoting Schlup, 513 U.S. at 327)). "This probability
 is met if it is more likely than not that no reasonable juror would have convicted him in light of the
 new evidence." Id. (citing Schlup, 513 U.S. at 327). In this case, thanks to the victim's uncle's
 testimony, the jury *was* aware of the fact that the victim was throwing up blood in the days before he

1 For the foregoing reasons, having reviewed the trial record, the state courts' habeas decisions,
 2 the R&R, and noting no specific objection from Petitioner as to this finding, the Court agrees with the
 3 Magistrate Judge's recommendation that Petitioner is not entitled to habeas relief on claim four.

4 **III. Certificate of appealability**

5 A petitioner complaining of detention arising from state court proceedings must obtain a
 6 certificate of appealability ("COA") to file an appeal of the final order in a federal habeas proceeding.
 7 28 U.S.C. § 2253(c)(1)(A). The court may issue a COA only if the petitioner "has made a substantial
 8 showing of the denial of a constitutional right." Id. § 2253(c)(2). To make a "substantial showing,"
 9 the petitioner must demonstrate that "reasonable jurists would find the district court's assessment of
 10 the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). In other
 11 words, the petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter,
 12 agree that) the petition should have been resolved in a different manner or that the issues presented
 13 were adequate to deserve encouragement to proceed further." Id. (citation and internal quotation marks
 14 omitted). In this case, the Court finds Petitioner has made the required showing of the denial of his
 15 constitutional rights with respect to his claim for unjustified shackling (claim three), and therefore
 16 GRANTS a COA as to this claim to the extent it is raised in the Petition.

17 **CONCLUSION**

18 For the reasons set forth herein, and based upon the Court's *de novo* review, the Court hereby
 19 (1) **REJECTS** Petitioner's objections; (2) **ADOPTS IN FULL** the Magistrate Judge's R&R; (3)
 20 **DENIES** the request for an evidentiary hearing; (4) enters the judgment **DENYING** and
 21 **DISMISSING** the Petition, and (5) **GRANTS** a COA as to claim three.

22 **IT IS SO ORDERED.**

23
 24 **DATED: July 6, 2010**

25 
 26 IRMA E. GONZALEZ, Chief Judge
 27 United States District Court

28

died. As for the two-year old witnessing the murder, as already noted, Petitioner cannot demonstrate
 that the result of his trial would have been any different had the jury been apprised of this fact.